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IN THE

SUPREME COURT OF THE UNITED STATES

No. 1502

WALLACE EUGENE McGEE,
Petitioner,

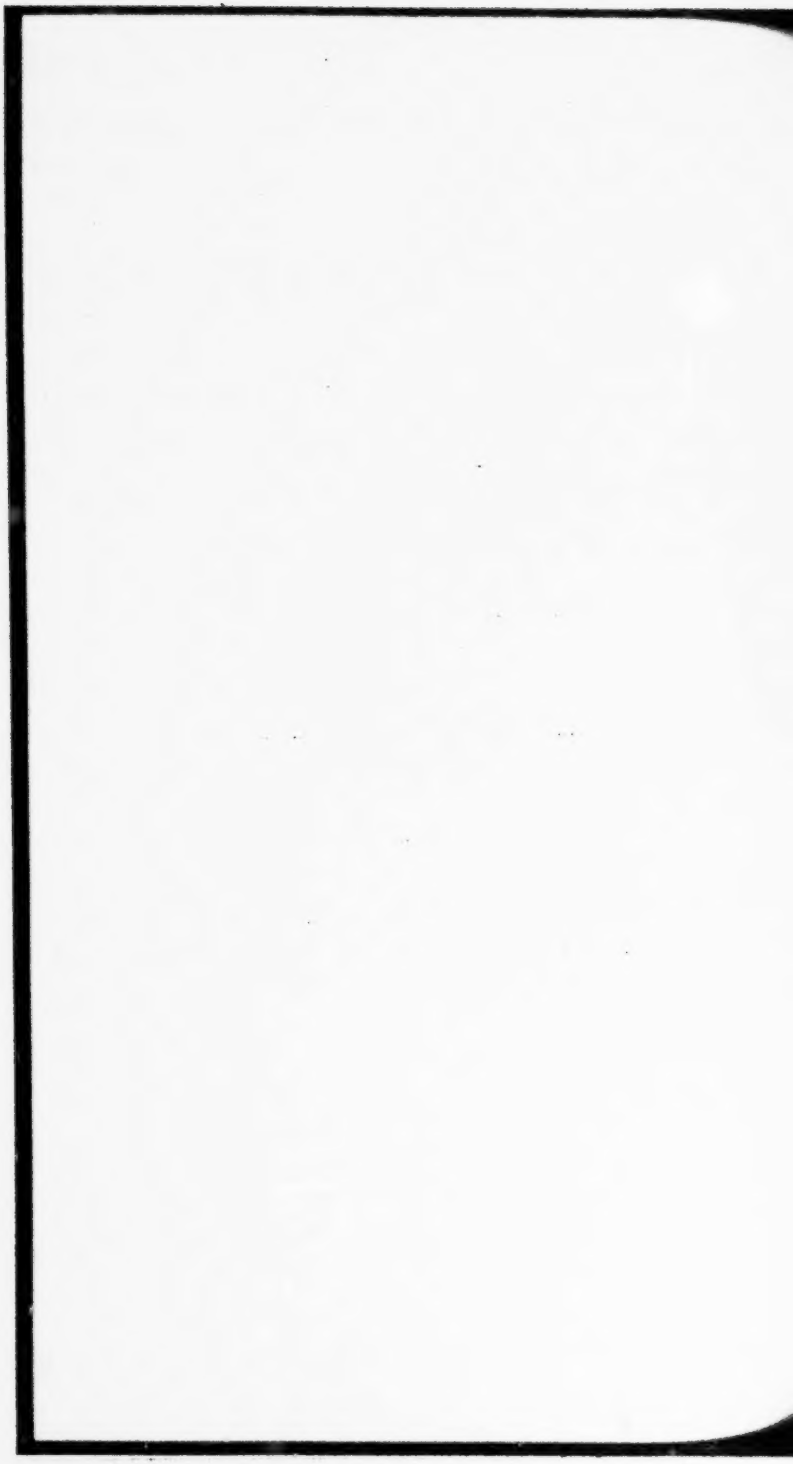
vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DALE QUILLEN
308 Cavalier Building
Nashville, Tennessee 37205
Attorney for Petitioner

R. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030



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SUPREME COURT OF THE UNITED STATES

No. .....

WALLACE EUGENE McGEE,
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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Wallace Eugene McGee, defendant-appellant below, respectfully prays that a Writ of Certiorari issue to review the order entered against him on March 3, 1970 by the United States Court of Appeals for the Sixth Circuit in the case of *United States of America* v. *Wallace Eugene McGee* (No. 18,660), affirming the judgment of the United States District Court for the Middle District of Tennessee in *United States* v. *McGee*, 282 F. Supp. 550 (M.D. Tenn. 1968).

OPINIONS BELOW

The orders of the United States District Court for the Middle District of Tennessee, overruling Petitioner's motion to dismiss the indictment and finding him guilty, are printed in the Appendix hereto, *infra*, Appendix A and Appendix B (pp. A1-A3 and A4). The order of the United States Court of Appeals for the Sixth Circuit is unreported and is printed in the Appendix hereto, *infra*, Appendix C (pp. A5-A6).

The opinion of the United States Court of Appeals for the Sixth Circuit in the case of *United States of America* v. *Roy Whitehead* (No. 18,607), on the basis of which Petitioner's case was affirmed, is printed in the Appendix hereto, *infra*, Appendix D (pp. A6-A25).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1).

QUESTIONS PRESENTED

Would the Petitioner have been compelled to incriminate himself in violation of the Fifth Amendment to the Constitution of the United States by complying with the registration and bond requirements of the statutes on which the indictment in this cause was based? These statutes are embodied in the United States Code as Sections 5179, 5601 (a) (1), 5173 and 5601 (a) (4) of Title 26. Generally, the statutes require the registration of distilleries and the posting of bond by distillers.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment V:
No person shall be * * * nor shall be compelled in any criminal case to be a witness against himself, * * *.

Title 26, U.S.C.:

"§5601. CRIMINAL PENALTIES (a) OFFENSES. —Any person who—

(1) UNREGISTERED STILLS.—has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179 (a); or . . ."

"§5179. REGISTRATION OF STILLS

(a) REQUIREMENTS.—Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register such still or apparatus with the Secretary or his delegate immediately on its being set up, by subscribing and filing with the Secretary or his delegate a statement, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its capacity, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used (except that stills or distilling apparatus not used or intended to be used for the distillation, redistillation, or recovery of distilled spirits are not required to be registered under this section). . . ."

"§5601 (a) (4). FAILURE OR REFUSAL OF DISTILLER OR RECTIFIER TO GIVE BOND.—carries on the business of a distiller or rectifier without having given bond as required by law; or . . ."

"§5173. QUALIFICATION BONDS (a) GENERAL PROVISIONS.—Every person intending to commence

or to continue the business of a distiller, bonded warehouseman, or rectifier, on filing with the Secretary or his delegate an application for registration of his plant, and before commencing or continuing such business, shall file bond in the form prescribed by the Secretary or his delegate, conditioned that he shall faithfully comply with all the provisions of law and regulations relating to the duties and business of a distiller, bonded warehouseman, or rectifier, as the case may be (including the payment of taxes imposed by this chapter), and shall pay all penalties incurred or fines imposed on him for violation of any of said provisions. . . ."

"§5222. PRODUCTION, RECEIPT, REMOVAL AND USE OF DISTILLING MATERIALS

(a) No mash, wort, or wash fit for distillation or for the production of distilled spirits shall be made or fermented in any building or on any premises other than on the bonded premises of a distilled spirits plant duly authorized to produce distilled spirits according to law; and no mash, wort, or wash so made or fermented shall be removed from any such premises before being distilled, except as authorized by the Secretary or his delegate; and no person other than an authorized distiller shall, by distillation or any other process, produce distilled spirits from any mash, wort, wash, or other material. . . ."

"§5601 (a) (7). UNLAWFUL PRODUCTION, REMOVAL, OR USE OF MATERIAL FIT FOR PRODUCTION OF DISTILLED SPIRITS.—except as otherwise provided in this chapter, makes or ferments mash, wort, or wash, fit for distillation or for the production of distilled spirits, in any building or on any plant lawfully qualified to produce distilled spirits, or removes, without authorization by the Secretary or his delegate, any mash, wort, or wash, so made or fermented, from the designated premises of such lawfully qualified plant before being distilled; or . . ."

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Title 39, Tennessee Code:

"39-2523. ATTEMPT TO MANUFACTURE INTOXICATING LIQUOR.—The offenses described in §§39-2521, 39-2522 shall be deemed to have been committed by any person who shall attempt to manufacture intoxicating liquor, either by assembling the necessary apparatus for the purpose of manufacturing intoxicating liquor as prohibited by law, or by doing any act preparatory to such manufacture; and any such attempt shall be punished as described in §39-2522. [Acts 1923, ch. 14, §2, Shan. Supp., §6793a24b1; mod. Code 1932, §11248.]"

"39-2524. POSSESSION OF A STILL—PENALTY.—It shall be unlawful for any person to have in his possession or control any still or other apparatus, or part thereof, used or intended to be used for the purpose of manufacturing intoxicating liquor as prohibited by law, and any person convicted of a violation of this section shall be deemed guilty of a misdemeanor, punishable by a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500), and by confinement in the county jail or county workhouse for a period of not more than one (1) year in the discretion of the trial court. [Acts 1923, ch. 12, §1; Shan. Supp., §6798a25b1; mod. Code 1932, §11249.]"

"39-2525. POSSESSION OF STILL AS PRIMA FACIE EVIDENCE OF PURPOSE.—When any person is found in the possession or control of any still or apparatus, or part thereof, suitable or designed for the manufacture of intoxicating liquor, such possession or control shall be deemed prima facie evidence in a prosecution under §§39-2521—39-2524 that such possession or control was for the purpose of manufacturing intoxicating liquor as prohibited by law. [Acts 1923, ch. 12, §2; Shan. Supp., §6798a25b2; Mod. Code 1932, §11250.]"

STATEMENT OF THE CASE

An indictment was filed against petitioner on September 26, 1967 in which he was specifically charged in three separate counts with having violated the provisions of the Internal Revenue Code relating to the Registration of a distillery. He was charged in Count I with having in his possession and custody, and under his control, a still and distilling apparatus for the distillation of spiritous liquors set up without having same registered as required by Title 26, United States Code, Section 5179(a).

The petitioner was charged in the second count of the indictment with having carried on the business of a distiller of spiritous liquor without having given bond as required by Title 26, United States Code, Section 5173.

The third count of the indictment charged the petitioner with having wilfully and unlawfully made and fermented mash fit for distillation on premises other than a distillery duly authorized according to law, in violation of Title 26, United States Code, Sections 5222 and 5601 (a) (7).

All of these violations were allegedly committed on June 12, 1967 in Hickman County, Tennessee.

Petitioner moved the District Court to dismiss the indictment on the grounds that compliance with the provisions of Chapter 51 of the Internal Revenue Code would have been incriminating under the laws of the State of Tennessee, to-wit: Sections 39-2523, 39-2524 and 39-2525, of the Tennessee Code Annotated.

The memorandum opinion of the Court overruling the petitioner's motion to dismiss is incorporated in the appendix herein.

Trial by jury was waived and the case was submitted to the Court on stipulated facts. It is conceded that the stipulated facts submitted to the Court sustain the court's finding of the petitioner guilty on each of the three counts of the indictment, if this Court should determine that the statutes in question do not violate the Fifth Amendment privilege against self incrimination.

The petitioner was found guilty by the Court as charged on each of the three counts of the indictment and was sentenced to a term of two years on each of said counts, all sentences to run concurrently with each other. Petitioner is now at large on bail.

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit on the sole issue of whether the statutes upon which the indictment was based compel self-incrimination in violation of the Fifth Amendment to the United States Constitution. The Court of Appeals affirmed, concluding that its en banc determination in *United States* v. *Roy Whitehead,* (Appendix D), decided March 3, 1970, was "controlling as to the central issue presented in the present appeal . . ." (Appendix C).

ARGUMENT

The petitioner is relying upon the cases of *Marchetti* v. *U. S.*, 88 S. Ct. 697; *Grosso* v. *U. S.*, 88 S. Ct. 709 and *Haynes* v. *U. S.*, 88 S. Ct. 722. These three cases were decided by the Supreme Court of the United States on January 29, 1968.

Petitioner contends that the registration of his distillery and execution of a bond in compliance with the provisions of the Internal Revenue Code would have incriminated him for the reason that he would have been furnishing evidence which would have been available to

authorities of the State of Tennessee to be used as evidence against him in the Criminal Courts of that state.

Petitioner has alleged and now reiterates that compliance with the provisions of the federal statutes quoted herein, *supra*, would have compelled him to have incriminated himself under the provisions of the laws of the State of Tennessee, and particularly, Sections 39-2523, 39-2524 and 39-2525.

The United States District Courts in Tennessee have reached opposing answers to the question here presented. The United States District Court for the Eastern District of Tennessee in the case of *United States* v. *Fine*, 293 F. Supp. 189 (E.D. Tenn. 1968) held that the statutes did compel self incrimination. The District Court below disagreed. *United States* v. *McGee*, 282 F. Supp. 550 (M.D. Tenn. 1968).

The two District Courts which have arrived at conflicting decisions have done so by failing to agree on whether the distilling statutes "are directed at a highly selective group inherently suspect of criminal activities," the terminology originated in *Albertson* v. *Subversive Activities Control Board*, 382 U. S. 70, 79 (1965).

The petitioner contends that the true question is whether the statute inflicts punishment upon an individual for his failure to incriminate himself, and commends to this Court the vigorous dissenting opinion of Judge McCree, concurred in by Judges Combs and O'Sullivan, in *United States* v. *Whitehead* (Appendix D, pp. A6-A25).

We insist that the self incrimination clause of the Fifth Amendment prohibits the use of incriminating evidence in a criminal case obtained by any means of compulsion, whether it be by legislative enactment or the rubber hose at the police station. We further contend that the Fifth

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Amendment guarantee cannot be logically interpreted to afford protection only to criminals. Certainly it applies to all citizens alike.

On the other hand, petitioner insists that the court was correct in *Fine, supra,* in finding that legislation dealing with intoxicating liquors and alcoholic beverage is directed to an area permeated with criminal activity. The so-called "bone-dry" liquor laws are still in force in much of the State of Tennessee, including Hickman County where petitioner lived and where the violation allegedly occurred. In fact, the manufacture of whiskey is permitted in only two counties of the State of Tennessee. These two counties have approved the manufacture of whiskey by local referendum. Populationwise, the two counties which have approved the manufacture of distilled spirits by local referendum, Coffee and Moore Counties, comprise a very small percentage of the population of the State of Tennessee, as well as a comparatively small percentage of the area of the state. Strangely enough, the retail sale of distilled spirits is still prohibited by the laws of the State of Tennessee in Moore County.

The petitioner insists that the statutory obligation to register the distillery and the execution of a bond are essentially inseparable elements of a registration proceeding, the requirements for which are all codified under the provisions of Chapter 51 of the Internal Revenue Code, as amended, and the rules and regulations promulgated pursuant thereto, said regulations having the force of law.

It is petitioner's position that Mr. Chief Justice Warren in his dissenting opinion in the *Marchetti* case, by inplication, has suggested that the provisions of the Internal Revenue Code relating to the registration of stills are now within the ambit of the majority opinion in the *Marchetti, Grosso* and *Haynes* cases.

CONCLUSION

For the foregoing reason, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DALE QUILLEN
Attorney for Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA
VS.
WALLACE EUGENE McGEE
} **Columbia Criminal Case No. 2331**

Order

(Filed March 15, 1968)

This criminal action is before the court on motion of the defendant, Wallace Eugene McGee, to dismiss the indictment on the grounds that the registration requirement of 26 U.S.C. § 5179, the bond requirement of 26 U.S.C. § 5173, and the prohibition of 26 U.S.C. § 5222 of making or fermenting mash fit for distillation "on any premises other than on the bonded premises of a distilled spirits plant duly authorized to produce distilled spirits according to law," violate his Fifth Amendment privilege against self-incrimination. The indictment herein, in three separate counts, charges these respective violations.

Defendant relies on the holdings of the Supreme Court in *Marchetti* v. *United States,* ..... U.S. ....., 36 L.W. 4143, *Grosso* v. *United States,* ..... U.S ....., 36 L.W. 4150, and *Haynes* v. *United States,* ..... U.S. ....., 36 L.W. 4164, all of which were decided on January 29, 1968. The first two of these cases involved the wagering tax statutes, while *Haynes* involved the registration provisions of the National Firearms Act.

Although not referred to by defendant, the case of *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70 (1965) must also be considered as it was the precursor

of the later decisions and must be considered as foreshadowing the results reached in them.

In *Albertson*, the court pointed out that the questions required to be answered in complying with the registration provisions of the statute "are directed at a highly selective group inherently suspect of criminal activities." (382 U.S. at p. 79.) *Albertson* also pointed out that the claims of self-incrimination "are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes." (Also at p. 79.)

In *Marchetti*, after discussion of both Connecticut and federal statutes aimed at gambling and wagering, the court said, "By any standard, in Connecticut and throughout the United States, wagering is 'an area permeated with criminal statutes,' and those engaged in wagering are a group 'inherently suspect of criminal activities.'" [Citing *Albertson.*] In *Grosso*, where the petitioner allegedly accepted wagers in Pennsylvania, after discussion of the Pennsylvania statutes providing for the punishment of gambling and ancillary activities, the court reiterated its language in *Marchetti.*

In discussing the National Firearms Act, in *Haynes*, the court pointed out that the registration requirements applied only to certain types of weapons and concluded that "these limitations were apparently intended to guarantee that only weapons used principally by persons engaged in unlawful activities would be subjected to taxation." (36 L.W. at 4165.)

On the other hand, the distillation of spirituous liquor is legal under federal law and is a legal business in most states, including Tennessee. It is true that in Tennessee it is not legal in every county, and it was not legal in Hick-

man County, Tennessee, wherein the offenses here involved are alleged to have occurred. To paraphrase *Albertson,* this court is of the opinion that the defendant's claims are asserted in an essentially non-criminal and regulatory area of inquiry. The purposes of the statutes under attack are, obviously, the protection of revenue from taxes imposed on the distilling industry, and the requirements of the statute are not aimed at "a selective group inherently suspect of criminal activities" (supra), but at the entire liquor distilling industry.

The court is of the opinion that what has been said clearly differentiates the questions presented here from the decisions in the cases relied on by defendant, and that such decisions are, therefore, not controlling on these newly asserted questions.

For the reasons stated, the court is of the opinion that the statutes under attack are not violative of the self-incrimination provisions of the Fifth Amendment. Accordingly, the motion to dismiss the indictment is overruled.

/s/ Frank Gray, Jr.
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA
VS.
WALLACE EUGENE McGEE

Columbia Criminal No. 2331

(Filed March 22, 1968)

This case was called on March 15, 1968, for further proceedings in connection with the defendant's motion to dismiss the indictment. The Government appeared by Assistant United States Attorney Alfred H. Knight, III. The defendant Wallace Eugene McGee appeared in person and by his attorney, Dale Quillen.

Thereupon, the Court ORDERED that the defendant's motion to dismiss the indictment be and the same is overruled, and a written Order to that effect was entered by the Court.

The defendant heretofore waived his right to a jury trial and the parties herein heretofore filed a stipulation of facts in this case, which stipulated facts, by agreement of the parties, the court could make a determination as to the guilt or innocence of the said defendant.

From a consideration of the stipulated facts in this case, the Court finds the defendant guilty as charged on each of the three-counts of the indictment.

Thereafter, the defendant Wallace Eugene McGee was brought before the Court for sentencing.

Enter:

/s/ Frank Gray Jr.
United States District Judge

Approved for Entry:
/s/ Alfred H. Knight
Assistant United States Attorney

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APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee
v.
WALLACE EUGENE McGEE
Defendant-Appellant

No. 18,660

Order

(Filed March 3, 1970)

Before: O'SULLIVAN, PECK and McCREE, Circuit Judges.

This case having come on to be considered on the record on appeal, and on the briefs and oral arguments of counsel, the Court, being fully advised in the premises, concludes that the en banc determination of this Court in *United States* v. *Roy Whitehead*, No. 18,607 decided March 3, 1970, is controlling as to the central issue presented in the present appeal, and it being further concluded that no errors prejudicial to the rights of the defendant-appellant intervened in the proceedings in the District Court,

IT IS ORDERED that the judgment of the District Court be and it hereby is affirmed.

Entered by Order of the Court

/s/ Carl W. Reuss
Clerk.

No. 18,660

UNITED STATES OF AMERICA v. WALLACE EUGENE McGEE

McCREE, J., concurring separately

Without relinquishing the views I expressed in *United States*, v. *Roy Whitehead*, No. 18,607, decided March 3, 1970, but obedient to the opinion of a majority of our Court, I concur in the instant order.

O'SULLIVAN, J., concurs for the same reasons expressed by Judge McCree.

APPENDIX D

No. 18607

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. ROY WHITEHEAD, *Defendant-Appellant*.	APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided March 3, 1970.

Before: PHILLIPS, Chief Judge, WEICK, EDWARDS, CELEBREZZE, PECK, McCREE, COMBS, BROOKS, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge

EDWARDS, Circuit Judge. This appeal presents constitutional issues upon which panels of this court have been divided. It was selected by the court *sua sponte* for in banc consideration. It was reargued before the entire bench in the December 1969 term of the court. The fundamental question presented is whether the Fifth Amend-

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ment bars appellant's conviction on an indictment charging violations of the federal alcohol tax laws. We hold that it does not.

Appellant was convicted on seven counts of an eight-count indictment and sentenced to concurrent terms totaling four years. The counts charged appellant with possession, custody and control of a still, the making of mash, the transportation of raw materials to an unlawful distillery, and the possession of distilled spirits, all in violation of the federal tax laws.[1]

The record discloses extensive surveillance of the house in Detroit, Michigan, where ultimately the still and 800 gallons of mash were found. Appellant was seen going into the house carrying 60-pound sacks of sugar and coming out with paper bags containing something heavy and loading same in cars. Two such cars were stopped by Internal Revenue agents. Appellant, who was driving one of them, was arrested. Both cars were found to be loaded with nontax-paid whiskey. Thereupon a search warrant was procured for the house, the still was found, and appellant was indicted.

Appellant contends that the evidence was insufficient to sustain conviction on several counts, including Count 6 pertaining to the making of mash. He also contends that various provisions of the federal tax laws violated his Amendment rights under Supreme Court decisions in the *Marchetti*,[2] *Grosso*,[3] and *Haynes*[4] cases.

1. 26 U.S.C. §§ 5173(a), 5601(a)(4), 5205(a)(2), 5179(a), 5601(a)(1), 5222(a)(1), 5601(a)(7), 5178(a)(1)(B), 5601(a)(6), 5180(a), 5681(c) (1964).

2. *Marchetti* v. *United States*, 390 U.S. 39 (1968).

3. *Grosso* v. *United States*, 390 U.S. 62 (1968).

4. *Haynes* v. *United States*, 390 U.S. 85 (1968).

We believe that the evidence of appellant's activity in and about the premises were acts which represented much more than presence at the site of a still (*see United States* v. *Romano*, 382 U.S. 136 (1965)) or assistance in only one phase of an illegal liquor business (*see Bozza* v. *United States*, 330 U.S. 160 (1947)). Appellant was seen engaged in activities from which the jury could have inferred that he was carrying supplies for illegal manufacture of liquor into a house and carrying the illegal liquor out. He was arrested while driving an automobile which contained illicit whiskey which the jury had every right to infer was a product of an illegal still operated by appellant.

As to the count which alleged illegal manufacture of mash, appellant was seen carrying heavy bags of sugar into the house where subsequently the still and some distilled liquor were found. The sugar bags were found empty in a closet in the house. Eight hundred gallons of mash were also found there.

All in all, there was both direct and circumstantial evidence from which the jury could have inferred appellant's guilt on all counts beyond a reasonable doubt. *Ramsey* v. *United States*, 248 F.2d 740 (6th Cir. 1957); *Chadwell* v. *United States*, 260 F.2d 257 (6th Cir. 1958).

Turning to the constitutional issue, we note that appellant herein did not seek to raise the Fifth Amendment privilege at trial. Nonetheless, we do not consider the privilege to have been waived in this case and we elect to decide this issue on its merits. *See Grosso* v. *United States*, 390 U.S. 62, 63, 70, 71, (1968); *Drennon* v. *United States*, 393 F.2d 342 (8th Cir. 1968); *Greenwood* v. *United States*, 392 F.2d 558 (4th Cir. 1968); *United States* v. *Manfredonia*, 391 F.2d 229 (2d Cir. 1968); *Harris* v. *United States*, 390 F.2d 616 (8th Cir. 1968); *but see Howard* v. *United States*, 397 F.2d 72 (9th Cir. 1968).

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We are urged to hold these tax measures unconstitutional in that they require the performance of certain affirmative acts; here, the posting of a sign at the site of a lawful distillery, the furnishing of bond, the purchase and affixing of tax stamps and the filing of registration information. Appellant asserts that these affirmative acts might create for some prospective taxpayers in some possible situations "hazards of incrimination . . . [which] are not trifling or imaginary." *Marchetti* v. *United States*, 390 U.S. 39, 54 (1968).

At the outset we emphasize that we do not read these words as having been written as a litmus paper test of constitutionality. It is "compelled" self-incrimination against which the Fifth Amendment has been held to offer protection. Every criminal act, no matter how voluntary, creates some real hazard of incrimination. And where regulatory legislation provides penalties for failure to perform certain acts normally the Fifth Amendment does not apply because the omission is not deemed "compelled."

We do not think that the Supreme Court has as yet provided a wholly clear rationale for distinguishing constitutional exercise of taxing and regulatory powers from those situations wherein fatal Fifth Amendment conflicts are to be found. In such a situation we would proceed with some caution and with strict construction of the case holdings if the issue involved appeared to be in doubt. In our instant case, however, we believe there is no reason for doubt.

There are clear and important distinctions between the currently disputed provisions of alcohol tax statutes and those statutory provisions which were held vulnerable to attack on Fifth Amendment grounds in the *Marchetti*, *Grosso* and *Haynes* cases. (*See also Leary* v. *United States*, 395 U.S. 6 (1969)).

Underlying the series of cases to which we have referred is the Supreme Court's holding in *Albertson* v. *SACB*, 382 U.S. 70 (1965). The Supreme Court there distinguished between the *Sullivan* case (*United States* v. *Sullivan*, 274 U.S. 259 (1927)) which upheld as constitutional the requirement of filing an income tax return, and an order requiring a Communist to register as such and thus furnish evidence of his violation of two federal criminal statutes.

In *Albertson* the Supreme Court said:

> "In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime." *Albertson* v. *SACB*, *supra* at 79.

The Public Purpose

The alcohol tax laws are "essentially noncriminal" revenue measures. Until the Sixteenth Amendment to the United States Constitution (income tax), taxes on alcoholic beverages provided the fundamental financing of the United States government.

Even after enactment of the federal income tax, the alcohol tax laws constitute substantial revenue producing measures.

As the Fourth Circuit has noted:

> "In 1966, the taxes on distilled spirits produced $3.7 billion in internal revenue. The wagering tax

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scrutinized in *Marchetti* produced 'in the past several years' only $115 million. 390 U.S. at 82, 88 S.Ct. at 721.

"We think the failure of these defendants to designate place of manufacture and to post a distillery bond is due to their wish to avoid the federal tax of $10.50 per gallon on distilled spirits. The evasion of tax alone provides the enormous margin of profit in the white whiskey business and accounts for the delinquency here. It lies well within the power of Congress to exercise a regulatory function to enforce the collection of such lawfully due taxes." *United States* v. *Walden*, 411 F.2d 1109, 1112 (4th Cir. 1969). (Footnote omitted.)

In a preprohibition case, the United States Supreme Court provided this description of the alcohol tax laws of that day — a description which we feel entirely appropriate to describe the statute currently under attack:

"It is clear, even upon a cursory reading, that the well-considered and minute provisions of the Revised Statutes found in chapter 4, entitled 'Distilled Spirits,' of Title XXXV., entitled 'Internal Revenue,' were adopted with one purpose only, namely, to secure the payment of the tax imposed by law upon distilled spirits.

"All the regulations for the manufacture and storage, the marking, branding, numbering, and stamping with tax stamps, of distilled spirits, and all the penalties, forfeitures, fines, and imprisonments prescribed by the chapter mentioned, have that end only in view. If the tax on distilled spirits were repealed, all the ingenious and complicated provisions of the chapter would become useless and insensible." *United States* v. *Ulrici*, 111 U.S. 38, 40 (1884).

Returning to the language of *Albertson*, the statutory provisions here attacked are "neutral on their face and directed at the public at large." The manufacture of alcoholic beverages is lawful under some circumstances in all 50

states and the District of Columbia and the taxes are collected from thousands of persons engaged in lawful sale and distribution of these products.

The Fifth Circuit has expressed this view in a case upon which the Supreme Court has already denied certiorari:

> "Perhaps if this prosecution had occurred under an appropriate statute that existed during the short life of the Eighteenth Amendment to the United States Constitution, appellants could properly equate their situation to the appellants in Marchetti. As it is, however, we are informed by the government's brief, and it is not disputed, (a matter of which we can take judicial notice) that possession of distilled spirits is legal to some extent in every one of the fifty states of the union. Therefore, we find ourselves in agreement with those district courts in addition to the trial court here, which have held that there is no danger of self incrimination resulting from the requirement of Sections 5205(a)(2) and 5604(a)(1) relating to the placing of stamps and taxing of distilled spirits." *Brown* v. *United States*, 401 F.2d 769, 770 (5th Cir. 1968), *cert. denied*, 394 U.S. 962 (1969).

The Effect on the Individual

Regardless, however, of what we have written thus far pertaining to the purpose of the alcohol tax laws, appellant would argue that the Fifth Amendment privilege depends upon no such balancing of rights and is absolute as to him. We cannot perceive, however, how the affirmative acts here objected to can be held to represent compelling this appellant "in any criminal case to be a witness against himself." U. S. Const. amend. V. Contrary to the facts in the *Albertson* case, these statutory provisions are not aimed at exposing "a highly selective group inherently suspect of criminal activities" to prosecution under other criminal stat-

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utes. Nor do we find here a compelled response which might involve "the admission of a crucial element of a crime."

These statutes do apply generally to all who manufacture liquor, including many persons or organizations who do so entirely lawfully within the State of Michigan. We find here no purpose to aid state officialdom in suppressing activities generally rendered illegal by state law. *Cf. Marchetti* v. *United States, supra*; *Grosso* v. *United States, supra.*

We certainly do not find here that "Congress intended information obtained as a consequence of [the requirements of these statutes] to be provided to interested prosecuting authorities." *Marchetti* v. *United States, supra* at 58, 59.

Nor do we find that these statutes have "an obvious purpose . . . to coerce evidence from persons engaged in illegal activities for use in their prosecution." *Grosso* v. *United States, supra* at 74 (concurring opinion).

Indeed, the alcohol tax statutes were drafted with the purpose of keeping persons of ill-repute out of the alcohol beverage manufacturing business. *Seaway Beverages, Inc.* v. *Dillon*, 319 F.2d 722 (D.C. Cir.), *cert. denied*, 375 U.S. 923 (1963). And these federal statutes — in place of seeking to expose a limited class of law violators to state prosecution (*Cf. Marchetti, Grosso* and *Haynes*) — prohibit issuance of a basic permit upon a finding "that the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted." 27 U.S.C. § 204(a)(2)(C) (1964).

Absent the prior securing of the basic permit on a showing of compliance with state law, it is greatly to be doubted that any other of the affirmative acts required as a prerequisite to legal manufacture of alcoholic beverages under fed-

eral law (*i.e.*, posting of bond, securing and posting of a distillery sign, securing and affixing of tax stamps) could actually be performed.

For example, Title 27 §203 makes it unlawful to manufacture, ship or sell any distilled spirits, except pursuant to the basic permit referred to above. And appellant in this case (if we hypothesize his ability to show compliance with state law) could not have received such a basic permit to manufacture distilled spirits on the premises involved in this case because 26 U.S.C. §5178 flatly prohibits such a plant "in any dwelling house."

The possibility of appellant's self-incrimination by dint of actual compliance with the statutory provisions attacked herein is considerably less than "purely hypothetical." *Cf. Minor* v. *United States*, —— U.S. (1969). (Decided Dec. 8, 1969, Slip op. p. 10).

In summary, the statutory provisions attacked in this appeal are a far cry from the statutory provisions invalidated in *Marchetti, Grosso* and *Haynes* which the Supreme Court held deliberately sought to expose federal registrants to state prosecution. Here federal registration is prohibited unless the registrant is in compliance with state law. This appellant could not, if he had tried, have gotten his name on any list of federal registrants because that list was a list of lawful distillers under both state and federal laws and not as in *Marchetti* and *Grosso* a list of gamblers whose activities were illegal under state law. Judge McCree's dissent suggests that appellant might have "attempted" registration and in effect told the federal authorities of his intention to make white whiskey in residential premises. Since there would have been no conceivable federal statutory benefit from such a disclosure, we cannot perceive how it could be deemed "compelled" in any Fifth Amendment sense.

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We find no abuse of appellant's Fifth Amendment rights.

While this is a case of first impression in this court, we are by no means plowing new ground in the federal law. Three circuits and many District Courts have already reached the same conclusion. *United States* v. *Fricano*, 416 F.2d 434 (2d Cir. 1969); *United States* v. *Walden*, 411 F.2d 1109 (4th Cir. 1969); *Wilson* v. *United States*, 409 F.2d 604 (5th Cir.), *cert. denied*, 395 U.S. 923 (1969); *Thornburg* v. *United States*, 406 F.2d 1060 (5th Cir. 1969); *Grant* v. *United States*, 407 F.2d 56 (5th Cir. 1969); *Hall* v. *United States*, 407 F.2d 1320 (5th Cir. 1969); *United States* v. *Ellington*, 406 F.2d 348 (5th Cir. 1969); *Shoffeitt* v. *United States*, 403 F.2d 991 (5th Cir. 1968), *cert. denied*, 393 U.S. 1084 (1969); *Anderson* v. *United States*, 403 F.2d 206 (5th Cir. 1968); *Brown* v. *United States*, 401 F.2d 769 (5th Cir. 1968), *cert. denied*, 394 U.S. 962 (1969); *United States* v. *Young*, 284 F. Supp. 1008 (E.D. Tenn. 1968); *United States* v. *Richardson*, 284 F. Supp. 419 (M.D. Ala. 1968); *United States* v. *McGee*, 282 F. Supp. 550 (M.D. Tenn. 1968). *Contra, United States* v. *Fine*, 293 F. Supp. 189 (E.D. Tenn. 1968).

The judgment of the District Court is affirmed.

McCREE, Circuit Judge (dissenting in part). I would affirm appellant's conviction on count 6 for making and fermenting mash on premises not lawfully qualified for the production of distilled spirits in violation of 26 U.S.C. §§ 5222(a)(1) and 5601(a)(7) and on count 7 for aiding and assisting in the use of a still for the production of distilled spirits in a dwelling house in violation of 26 U.S.C. §§ 5178(a)(1)(B) and 5601(a)(6). Appellant's only objection to his convictions on these counts is directed to the sufficiency of the evidence to uphold these convictions, and I agree that the evidence is sufficient to uphold them.

I would, however, reverse appellant's convictions on count 1 for carrying on the business of a distiller without giving bond in violation of 26 U.S.C. §§ 5173(a) and 5601(a)(4); on counts 3 and 4 for possessing and transporting distilled spirits in containers not having affixed thereto the required venue stamps in violations of 26 U.S.C. §§ 5205(a)(2) and 5604(a)(1); on count 5 for possessing an unregistered still in violation of 26 U.S.C. §§ 5179(a) and 5601(a)(1); and on count 8 for carrying and delivering raw materials to an unlawful distillery at which no sign was posted in violation of 26 U.S.C. §§ 5180(a) and 5681(c). I would reach this result because appellant's refusal to comply with the statutory requirements upon which these convictions are based was a proper exercise of his fifth amendment privilege against self-incrimination and therefore he may not be criminally punished for his failure to comply. *See Marchetti* v. *United States*, 390 U.S. 39, 61 (1968).

The fifth amendment provides, in pertinent part, that "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." In a series of recent decisions involving the relationship between this privilege and the Government's right to require a person, upon threat of criminal prosecution, to provide potentially incriminating information, the Supreme Court has decided that "The *central standard* for the privilege's application [is] whether the claimant is confronted by substantial and 'real,' not merely trifling or imaginary, hazards of incrimination." *Marchetti* v. *United States*, *supra* at 53 (emphasis added). *Accord*, *Grosso* v. *United States*, 390 U.S. 62 (1968); *Haynes* v. *United States*, 390 U.S. 85 (1968); *Leary* v. *United States*, 395 U.S. 6 (1969). If the obligation to provide information creates " 'real and appreciable', and not merely 'imaginary and unsubstantial,' hazards of self-incrimination," a person cannot be criminally

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punished for refusing to comply. *Marchetti* v. *United States, supra* at 48.

At the outset, it should be observed that this standard renders inapposite one of the factors relied on by the majority to distinguish *Marchetti, Grosso, Haynes* and *Leary* from the present case. For example, the majority points out that the alcohol tax laws are "essentially non-criminal revenue measures" and that the purpose of the disclosure provisions is to facilitate securing the payment of the taxes imposed and not to aid law enforcement officials in their efforts against illegal manufacturers of distilled spirits. However, regardless of the Congressional purpose for inclusion of the disclosure provisions in the alcohol tax laws, the refusal to comply with these provisions cannot be criminally punished if compliance would create substantial and real hazards of self-incrimination. *See generally Counselman* v. *Hitchcok,* 142 U.S. 547, 585 (1892).[1] The question before us, then, is whether appellant ". . . may be compelled to give evidence against himself." *Marchetti* v. *United States, supra* at 51.

Considering the substantiality of the risk of self-incrimination if appellant complied with the disclosure provisions of the alcohol tax laws, the majority concludes that the degree of risk involved is "considerably less than 'purely hypothetical'" (1) because the disclosure provisions are "directed at the public at large" and not "at a highly selective group inherently suspect of criminal activities", *Albertson* v. *SACB,* 382 U.S. 70, 79 (1965), and (2) because it is doubtful, in any event, whether appellant would ever have the opportunity to perform the affirmative acts of disclosure.

1. It is interesting to speculate on the effect on the privilege against self-incrimination of a doctrine which would permit infringement of the privilege if occasioned by a legitimate Congressional purpose, since the suppression of criminal activity, in certain areas, would be a legitimate Congressional purpose.

Admittedly, compliance with a statutory provision requiring the disclosure of illegal activity creates a greater risk of self-incrimination when the disclosure requirement is directed at a "group inherently suspect of criminal activities," since it identifies the discloser as a member of the suspect group. *Leary* v. *United States, supra* at 18. *See also Marchetti* v. *United States, supra* at 57; *Grosso* v. *United States, supra* at 68. However, the character of the group subject to a disclosure requirement certainly is not by itself determinative of the substantiality of the risk of self-incrimination attendant on compliance with such a requirement. Even if the requirement is not directed at an inherently suspect group, the risk encountered as a consequence of compliance may still be "real and appreciable".

Indeed, manufacturers of distilled spirits are a prime example of this. Although distillers may not be a "group inherently suspect of criminal activities," they are involved in a business which is subject to extensive state and federal controls. In Michigan, the liquor industry is an area permeated with statutory requirements, the violation of which can be criminally punished. *See, e.g.*, Mich. Comp. Laws §§ 436.1, 436.2, 436.17, 436.19, 436.22, 436.32, 436.50. Moreover, at the time appellant was engaged in the illegal manufacture of distilled spirits, there was a statutory requirement that certain internal revenue offices maintain a list of persons who had paid the special taxes assessed on the manufacture of distilled spirits and that this list be furnished to any prosecuting officer of any state, county, or municipality upon request. 26 U.S.C. § 6107.[2] There

2. This provision was repealed, effective December 16, 1968, by Section 203 (a), Title II of the Gun Control Act of 1968, Pub. L. No. 90-618, 1968 U.S. Code Cong. & Adm. News 1423, but this does not affect the relevance of section 6107 to the substantiality of the risk of self-incrimination confronting appellant at the time of his illegal activity. *See Albertson* v. *SACB*, 382 U.S. 70, 77 (1965). Furthermore, although the internal revenue service is no longer required to compile a list of persons who pay the special alcohol taxes and to furnish this list to prosecuting officials, "neither has

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is therefore sufficient attention focused on manufacturers of distilled spirits to indicate that the hazards of self-incrimination attendant on compliance with the disclosure provisions of the alcohol tax laws would be more than "merely trifling or imaginary."

The important inquiry then is whether, in reality, these hazards ever would materialize. *Cf. Leary* v. *United States,* 395 U.S. 6 (1969); *Buie* v. *United States,* No. 271 (U.S., Dec. 8, 1969); *Minor* v. *United States,* No. 189 (U.S., Dec. 8, 1969). The majority concludes that this is "greatly to be doubted" because a prerequisite to compliance with the disclosure provisions of the alcohol tax laws is the securing of a basic permit, 27 U.S.C. § 203(b)(1), and the Secretary of the Treasury is prohibited from issuing a basic permit when "the operations proposed to be conducted . . . are in violation of the law of the State in which they are to be conducted." 27 U.S.C. § 204(a)(2)(C).

The effect on the privilege against self-incrimination of practical barriers to actual compliance with provisions requiring disclosure of illegal activity depends on the nature of the barriers. In *Leary* v. *United States, supra,* the Government contended that there was no substantial risk of self-incrimination because one who intended unlawfully to purchase marihuana would know he could not obtain the order form which contained the incriminating questions and consequently never would apply for it. The Government also contended that even if the buyer did apply for an order form, it was doubtful that the unsuccessful application would be revealed to law enforcement officials. *Id.* at 18-20. The Supreme Court rejected both of these con-

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Congress imposed explicit restrictions upon the use of information obtained as a consequence of payment of the tax." *Grosso* v. *United States,* 390 U.S. at 66. *See Marchetti* v. *United States,* 390 U.S. at 60, n. 18.

tentions and concluded that "real and appreciable" hazards of self-incrimination did confront Leary because the Congressional intent, as revealed by the statutory scheme adopted, was that an unlawful purchaser of marihuana should be able to obtain an order form.

On the other hand, in *Buie* v. *United States, supra,* the Court decided that the practical barriers encountered by one who unlawfully sold marihuana were sufficiently insurmountable to preclude any real possibility that he actually would comply with the order form requirements and thereby incriminate himself. Indeed, it was the Court's earlier decision in *Leary* that reduced the hazards of self-incrimination to the point where they were "imaginary and unsubstantial" as far as the seller was concerned because its decision relieved the purchaser of marihuana of his obligation of obtaining the order form and of providing the seller with an opportunity to comply with its requirements and thereby incriminate himself. *Buie* v. *United States, supra* at 2 - 4 of slip. op.

The practical barriers to compliance confronted by appellant in the instant case are not as artificial as those in *Leary,* but neither are they as substantial as those in *Buie.* Although a basic permit is a prerequisite to the lawful manufacture of distilled spirits, the absence of such a permit might not preclude appellant from complying with the provision requiring him to post a sign at the site of the still. 26 U.S.C. § 5180(a). Under the terms of the statute and the regulation adopted pursuant thereto, appellant apparently could have complied with this requirement merely by fabricating a sign containing the required information and installing it. *See* 26 C.F.R. § 201.235. Since "a sign placed conspicuously on the outside front or entrance [of the still] and exhibiting in readily legible and durable characters (a) the real name of the proprietor, (b) the

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plant number, and (c) the designation of the kind of business", 26 C.F.R. § 201.235, would disclose the operation of the still, I think the hazards of incrimination attendant on compliance with 26 U.S.C. § 5180(a) are "real and appreciable". Accordingly, I would hold that appellant cannot be criminally punished for his failure to comply with this statutory provision.

The necessity of a basic permit and the prohibition on its issuance if the proposed operation violates the laws of the state probably would foreclose "literal and full compliance" with the statutory provisions requiring appellant to register the still and to file a qualification bond. 26 U.S.C. §§ 5179(a), 5173(a). However, the basic permit requirement would not prevent appellant from *attempting* to comply with the registration and qualification bond provisions by submitting an application. There is no statutory requirement that a distiller obtain a basic permit prior to filing an application for registration and a qualification bond.[3] Also, pursuant to 26 U.S.C. § 5171(a), "Every person *shall, before commencing* or continuing the business of a distiller . . . make application" for the registration of his still. (Emphasis added). Accordingly, under the statutory scheme adopted by Congress, a distiller can file the registration form and qualification bond simultaneously with his request for a basic permit. Moreover, the likelihood that a distiller would do this is increased by the fact that he can lawfully obtain distilling apparatus prior to securing a basic permit.

Similarly, appellant also would not be precluded from *attempting* to procure the revenue stamps which must be affixed to containers of distilled spirits. 26 U.S.C. § 5205 (a) (2). Again, the likelihood of "literal and full compli-

3. The qualification bond is filed at the same time as the application for registration. 26 U.S.C. § 5173(a).

ance" is small, since the purpose of the stamps is to evidence compliance with the provisions of the alcohol tax laws. However, in determining whether appellant would attempt to comply with this requirement, and with those imposed by sections 5179(a) and 5173(a), I doubt that we are permitted to speculate that, in reality, he would not attempt to obey the law. Implicit in the Supreme Court's decision in *Leary* is the notion that regardless of whether, in reality, one who purchases marihuana illegally would attempt to obtain an order form, the Court, in analyzing the substantiality of the risks of self-incrimination, would assume that this was a realistic alternative for the purchaser.[4]

Therefore, even with regard to the registration, qualification bond, and revenue stamp requirements, the hazards of self-incrimination confronting appellant were greater than those confronting Buie. In *Buie*, the Court concluded that the seller would never have an opportunity to complete the order form and disclose his illegal activity.[5] Appellant, on the other hand, by attempting to comply with the requirements of 26 U.S.C. §§ 5170(a), 5173(a) and 5205(a)

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4. If the Court had not made this assumption, the substantiality of the risks of incrimination confronting Leary would have been no greater than those confronting Buie. In other words, if the Court took judicial notice of the fact that illegal purchasers of marihuana do not, in reality, attempt to comply with the requirement of obtaining an order form, the risks of self-incrimination confronting Leary would have been minimal. Accordingly, the significant distinction between *Leary* and *Buie* would seem to be that Leary could have attempted to obtain an order form and incriminate himself whereas Buie could not, since the obligation to procure the order form is on the purchaser. *See* 26 U.S.C. §§ 4705(a), 4742(a). In the present case, the various obligations imposed by the statutory provisions in question are on the distiller.

5. In *Buie*, the Court also observed that the statutory obligation to furnish the information requested on the order form was on the buyer and that this may eliminate the problem of "self-incrimination", as that term is ordinarily understood. In the present case it is the distiller himself who is obligated to disclose his activities.

(2), would reveal his intention to engage in the manufacture of distilled spirits.[6]

Of course, whether the potentially incriminating information provided by the attempt to comply would, in reality, ever be used by law enforcement officials to forge a " 'link in the chain' of evidence tending to establish his guilt," *Marchetti* v. *United States, supra* at 48, and thus, whether the hazards of incrimination involved in such an attempt are "real and appreciable", involves some conjecture. The court has before it no factual data indicating the likelihood that the information contained in unsuccessful applications to register, to post the qualification bond, and to obtain revenue stamps is passed on to other law enforcement officials. However, in the absence of such data, I would resolve the doubts in favor of the applicability of the Constitutoinal privilege.

Until recently, an exchange of information between treasury officials and prosecuting officers of states, counties, and municipalities with regard to persons paying the special taxes assessed on the manufacture of distilled spirits was mandated by 26 U.S.C. § 6107. Thus, the channels of communication have been established. Moreover, although 26 U.S.C. § 6107 has been repealed, *see* n. 2, *supra*, there are still no restrictions imposed upon the use of the potentially incriminating information contained in

6. The fact that appellant would be revealing an intention to violate the law at some future time may reduce the substantiality of the risks of self-incrimination, but it would not make these risks trifling or imaginary. "We see no reason to suppose that the force of the constitutional prohibition is diminished merely because confession of a guilty purpose precedes the act which it is subsequently employed to evidence . . . . [A]lthough prospective acts will doubtless ordinarily involve only speculative and insubstantial risks of incrimination, this will scarcely always prove true." *Marchetti* v. *United States*, 390 U.S. 39, 54 (1968), overruling *United States* v. *Kahriger*, 345 U.S. 22 (1953), and *Lewis* v. *United States*, 348 U.S. 419 (1955).

an application for registration or a qualification bond form. *See Grosso* v. *United States*, 390 U.S. at 66.

It is also relevant that "other methods, entirely consistent with constitutional limitations," *Haynes* v. *United States*, 390 U.S. at 98, could be employed to obtain the information provided by compliance with the statutory provisions in question. *See generally Counselman* v. *Hitchcock*, 142 U.S. 547, 585 (1892). *See also Adams* v. *Maryland*, 347 U.S. 179 (1954); *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964). Thus, permitting appellant to invoke the privilege against self-incrimination in order to prevent criminal prosecution for failing to comply with these provisions would not "prevent the effective regulation or taxation by Congress" of distilled spirits. *Haynes* v. *United States*, *supra* at 98.

Accordingly, I would hold that sections 5170(a), 5173 (a) and 5205(a) (2),[7] as well as section 5180(a), compelled appellant, upon threat of criminal punishment, to disclose his illegal activities and that the hazards of self-incrimination which would have resulted from disclosure were "real and appreciable". I would therefore reverse his convictions on counts one, three, four, five and eight.

Combs, Circuit Judge. I concur in Judge McCree's dissent. I am unable to find within the rule of *Marchetti* any distinction between "moonshiners" and members of "the syndicate."

O'Sullivan, Senior Circuit Judge. I concur in Judge McCree's dissent. I do so because I believe that his opin-

7. The fact that counts 3 and 4 are directed at appellant's possession and transportation of unstamped containers, and not at his failure to obtain revenue stamps *per se*, is irrelevant, since the effect of 26 U.S.C. § 5205(a)(2) is to require a distiller to obtain revenue stamps in order to lawfully possess and transport distilled spirits in containers. *See Haynes* v. *United States*, 390 U.S. 85, 90-95 (1968).

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ion is more consistent with *Marchetti* v. *United States*, 390 U.S. 39 (1968) than the carefully prepared opinion of Judge Edwards. I believe that, whether operating in Michigan, Tennessee, or elsewhere, "moonshiners" make up a "group inherently suspect of criminal activities" just as much as the "big time" gamblers who enjoy the protection of *Marchetti*. Emphasis is placed upon the fact that the alcohol tax laws are "essentially non-criminal". This is so, it is argued, because such laws exist primarily to raise revenue. Such laws do, however, provide *criminal* sanction for their violation and in most states, while the manufacture of distilled spirits is not totally forbidden, the activity for which this defendant was convicted—"moonshining"—is criminal activity wherever it is carried on.

Distinction is asserted to exist because the statute involved in *Marchetti* was purposely passed by Congress to interrupt criminal conduct—"big time" gambling carried on, in part at least, by "the syndicate", a part of organized crime. It is argued that Congress cannot impair the Fifth Amendment rights of those so engaged, but may forbid use of the Fifth Amendment by those who choose to violate the revenue laws relating to distilled spirits. The "moonshiner" has been as effectively deprived of the protection of the Fifth Amendment when he is convicted for failure to announce his intention to engage in criminal activity as is the interstate gambler, convicted for failure to register and disclose his intention to engage in crime. I am unable to discern legitimacy in the nuances employed to find distinction between the "moonshiner" and members of "the syndicate". So long as *Marchetti* is the law, it should be followed without discrimination.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1502

WALLACE EUGENE MCGEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On March 15, 1968, petitioner was convicted in the United States District Court for the Middle District of Tennessee (282 F. Supp. 550) of violating the federal statutory provisions relating to the registration and operation of a distillery (*e.g.*, 26 U.S.C. 5171 *et seq.*). The court of appeals affirmed *per curiam* (Pet. App. 5).

Petitioner acknowledges that the stipulated facts submitted to the trial court sustain the court's finding of guilt. The sole issue presented here is whether petitioner could properly claim that compliance with the statutory provisions relating to the registration of distilleries would have violated his privilege against self-incrimination. That issue is discussed at some

length in the government's brief in opposition in *Dryden, et al.* v. *United States,* No. 1462, this Term. As there explained, no Fifth Amendment privilege question arises from application of the statutory scheme relating to the liquor industry. Those involved in that business engage in activities which are basically non-criminal in character and appropriate for governmental regulation. The statutes are not disguises for obtaining incriminating disclosures; nor do they affect only a select group inherently suspect of criminal activities. The rationale of the cases on which petitioner seeks to rely (*Marchetti* v. *United States,* 390 U.S. 39, and like decisions) is thus inopposite.

Thus, for the reasons discussed more fully in our brief in opposition in *Dryden* and in the court of appeals' opinion in *United States* v. *Whitehead,* No. 18607 (C.A. 6), decided March 3, 1970 (set out at Pet. App. 6–25),[1] on which we here rely, it is respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1970.

[1] In the instant case the court below stated that the *Whitehead* case "is controlling as to the central issue presented in the present appeal * * *" (Pet. App. 5).

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In The

SUPREME COURT OF THE UNITED STATES,

October Term, 1969

No. . . 1502

WALLACE EUGENE McGEE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

DALE M. QUILLEN
308 Cavalier Building
95 White Bridge Road
Nashville, Tenn. 37205

In The

SUPREME COURT OF THE UNITED STATES,

October Term, 1969

No. . . 1502

WALLACE EUGENE McGEE,
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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

PETITION FOR REHEARING

Your petitioner, Wallace Eugene McGee, respectfully prays for a rehearing of the order of this Court, dated June 8, 1970, denying his petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

FACTS

This is a criminal action wherein petitioner was convicted and sentenced to two years imprisonment for violation of Title 26 U.S.C. by maintaining an unregistered distillery and manufacturing distilled spirits without paying taxes thereon. Petitioner contention is that under the doctrine of Grosso vs. United States, 88 Sup. Ct. 709, Haynes vs. United States, 88 Sup. Ct. 722 and Marchetti vs. United States, 88 Sup. Ct. 697, as supported by Leary vs. United States, 395 U.S. 6, compliance with these revenue statutes could not be required under the Fifth Amendment to the Constitution of the United States inasmuch as such compliance would constitute petitioner's incrimination of himself under the laws of Tennessee. The Court of Appeals avoided the thrust of these decisions by holding that the statutes involved were designed to appy to "inherently illegal" activities, whereas the present statutes were considered bonafide revenue measures and not aimed at illegal activities.

ARGUMENT

Petitioner would now submit to the Court the following matters not heretofore presented to illustrate the vital importance of the Federal question involved and the fallacy in the notion of the Court of Appeals that distillers are not a "group inherently suspect of criminal activities," particularly in Tennessee.

1. The Importance of the Federal Question. Petitioner asks this Court to take cognizance of the fact that there are now pending, to counsel's knowledge alone, more than twenty cases on the docket of the Sixth Circuit alone, many of which involve severe prison sentences, and all of which hang upon the question presented here; in these cases it has been agreed that the results will depend upon the outcome of the present case. In addition, there are many, many cases pending in District Courts, in Tennessee and elsewhere.

2. The Application of the Statutes to Criminal Conduct. The Court below was grossly mistaken in permitting itself to believe that these laws are not used primarily as a weapon against those suspected of criminal conduct. In 93 of Tennessee's 95 counties, the manufacturing of whiskey per se is as much an offense as Dr. Leary's possession of marijuana, and this is true regardless of any attempt, successful or unsuccessful, by the distiller to register his activities and otherwise comply with federal law. The federal law is regularly used as a mighty flail for the

suppression of distilling activities prohibited by Tennessee law. To mention only a few instances, Petitioner would cite the cases of U. S. vs. Rex Lynn Carden, No. 7100 in the Eastern District of Tennessee, wherein the defendant was sentenced to three years for a case involving 6 quarts of unstamped whiskey; U. S. vs. Cleona Hooper, No. 7055 in the same District, five years; and U. S. vs. Jay V. Ball, No. 7045 et al (two cases) in the same District, 10 years. These cases may be multiplied at will, and it is a matter of judicial record in the Eastern District of Tennessee that the maximum penalty is very often imposed, often in cases involving miniscule amounts of whiskey.

On the other hand, many, many cases involving precisely the same conduct for which Petitioner has been convicted, although investigated and brought by federal agents, are disposed of in state courts for nominal fines. This in itself shows that these sanctions are not being used, as a practical matter, for the collection of revenue, but for the suppression of illegal activity.

The choice of whether to pursue these matters in the federal courts with their severe sentences, or in the state courts with their slaps on the wrists rests largely with enforcement agents. This fact, coupled with the immense discretionary powers of the United States District Attorneys, breeds a selective and discriminatory system of law enforcement, which in itself is unhealthy and probably presents equal protection questions.

CONCLUSION

For the foregoing reasons, as well as those previously urged, it is earnestly suggested that this Court should now consider these statutes in light of the Grosso-Haynes-Marchetti-Leary doctrines. Petitioner therefore prays that the order of this Court denying his petition for a writ of certiorari to the Court of Appeals for the Sixth Circuit be reheard and vacated, and that the petition be granted.

Dated June 25, 1970.

DALE M. QUILLEN,
Attorney for Petitioner

CERTIFICATE OF COUNSEL

The undersigned, Dale M. Quillen, Attorney for Petitioner, hereby certifies that the Petition for Rehearing filed in this cause is presented in good faith, that in his judgment said petition is restricted to the grounds specified in Paragraph 2 of Rule 58 of this honorable Court, and that said petition for rehearing is not interposed for delay.

DALE M. QUILLEN,
Attorney for Petitioner